

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 73 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT INDUSTRIAL CO-OPERATIVE BANK,

Versus

STATE OF GUJARAT

Appearance:

MR ARUN H MEHTA for Petitioner
MR KP RAVAL, APP for Respondent No. 1
M/S THAKKAR ASSOC. for Respondent No. 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 26/11/1999

ORAL JUDGEMENT

1. Heard learned advocate Mr. Arun H. Mehta on
behalf of the petitioner, learned APP Mr. K.P.Raval on
behalf of Respondent No.1 State and learned advocate Mr.
P.M. Thakkar on behalf of respondent No.2.

2. As per the brief facts of the case, the petitioner had filed one Criminal Case No. 1915 of 1993 before the Judicial Magistrate, First Class, Vadodara, wherein present respondent No.2 and others were accused, under Section 138 of the Negotiable Instruments Act. In the aforesaid Criminal Case, present respondent No.2, vide Exh. 39, filed an application to drop the proceedings and discharge him from the criminal case. Learned Judicial Magistrate, First Class, vide his Order dated 26.12.1998, was pleased to grant the said application of discharge of respondent No.2 - original accused under Sec. 204 of the Criminal Procedure Code and, therefore, this petition is filed by the petitioner - original complainant to quash the above said order of discharge passed by the Judicial Magistrate, First Class, Vadodara and to direct that the respondent No.2 - accused be tried by the learned Magistrate.

3. As per the allegation of the complainant, cheques were issued by the respondent No.2 - accused to the petitioner and which were returned by the concerned bank with the endorsement of "insufficient fund". The point, which has arisen before the learned Judicial Magistrate was that the cheques though given earlier were not deposited in the bank till 30th June, 1993 and before 30th June, 1993, vide letter dated 29th June, 1993, the present respondent No.2 accused informed the complainant that not to deposit the above mentioned cheques issued by the respondent No.2 - accused in the bank till 15th July, 1993 and till 15th July 1993, he will arrange sufficient fund for making payment towards the cheques given by her. Therefore, the question which arose for consideration in the the above said application - Exh. 39, was when holder - in - due course had not deposited the cheques in the bank and before holder-in-due course deposits the cheques in bank, if the payee i.e. the present respondent No.2 accused, informs the holder-in-due course not to deposit the cheques upto certain date, then, in these circumstances, the payee i.e. accused can be saddled with the criminal liability as per Section 138 of the Negotiable Instruments Act.

4. Learned Chief Judicial Magistrate, First Class, Vadodara, has relied upon the decision of the Supreme Court in the case of ELECTRONICS TRADE AND TECHNOLOGY CORPN. LTD., SECUNDERABAD vs. M/s INDIAN TECHNOLOGISTS AND ENGINEERS (ELECTRONICS) (P) LTD., reported in AIR 1996 SC 2339. Learned Magistrate has placed reliance in para 7 of the above said judgment of the Apex Court, which reads as under :

" It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the Bank for non-payment and the cheque is returned to the payee with such an endorsement, it amounts dishonour of cheque and it comes within the meaning of Section 138. Suppose, after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the Bank for payment and when it is returned on instructions, Section 138 does not get attracted."

5. Therefore, learned Magistrate came to the conclusion that the complainant in this case did not deposit the cheques issued by respondent No.2 - accused No.2 in the bank till 30th June, 1993. On 29th June, 1993, the respondent No.2 has informed the complainant petitioner that the cheques be not deposited in the bank till 15th July, 1993, even then, the complainant deposited the cheques in the bank on 30th June, 1993 and the cheques were returned with the endorsement of "insufficient fund". Under these circumstances, the learned Magistrate held that according to the observation of the Apex Court in the afore mentioned decision, the respondent No.2 - accused cannot be saddled with the criminal liability under Section 138 of the Negotiable Instruments Act and, therefore, learned Magistrate allowed the application of the respondent No.2 - accused for discharge. Against which, the present petition is filed by the complainant.

6. Learned Advocate for the respondent No.2 has vehemently objected this petition while learned advocate Mr. Arun H. Mehta has cited ruling of the Apex Court in the matter of M/S MODI CEMENTS LTD vs. KUCHIL KUMAR NANDI, reported in AIR 1998 SC 1057. In this decision, the Hon'ble Supreme Court considered the observations made in the case of Electronics Trade & Technology Development Corporation Ltd., Secunderabad (supra) and came to the conclusion that once the cheque is issued by the drawer, a presumption under Section 139 in favour of holder must follow, and merely because the drawer issues a notice to the drawee or to the Bank for stoppage of the payment, it will not preclude an action under S. 138 of the Act by drawee or the holder of a cheque in due

course. The Apex court observed in para 16 as under :

"We see great force in the above submission

because once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. The object of Chapter XVII, which is intituled as 'OF PENALTIES IN CASE OF DISHONOUR OF CERTAIN CHEQUES FOR INSUFFICIENCY OF FUNDS IN THE ACCOUNTS" and contains Section 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. It is for the reason we are of the considered view that the observations of this Court in Electronics Trade & Technology Development Corporation Ltd., Secunderabad, (1996 AIR SCW 840) (supra) in paragraph 6 to the effect "suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted," does not fit in with the object and purpose for which the above chapter has been brought on the Statute Book."

7. Learned Advocate Mr. Arun H. Mehta finding support from the above mentioned decision of M/s Modi Cements Ltd (supra) has argued that the observations made by the Hon'ble Supreme Court in the matter of Electronics Trade & Technology Development Corporation Ltd., (supra) on which the learned Magistrate relied upon and discharged the accused, has been overruled by the Apex Court in the case of M/s Modi Cements Ltd. vs. Kuchil Kumar Nandi (supra).

8. Having considered the arguments of both the sides and in view of the principle laid down by the Supreme Court in M/s Modi Cements Limited (supra), it is now clear that once the cheque is issued by the drawer, a presumption under Section 139 of the Act must follow and merely because the drawer issues a notice to the drawee or to the Bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course.

9. In this view of the matter, learned Magistrate clearly erred in discharging respondent No.2 - accused vide his order dated 22nd January, 1998, which is required to be set aside. Therefore, the order passed by the Judicial Magistrate, First Class at Vadodara, in Criminal Case No. 1915 of 1993 below Exh. 39 discharging the present Respondent No.2 - accused under Section 138 of the Negotiable Instruments Act is set aside and the case is remanded back to learned Magistrate. The learned learned Magistrate is directed to proceed further in Criminal Case No. 1915 of 1993 from the stage before filling the Application at Exh. 39.

10. In the result, this Criminal Revision Application is allowed. Rule is made absolute.

p.n.nair